Petition

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No.

IN THE

Supreme Court of the United States

October Term 1982

ANNE W. SWOBODA, individually and as personal representative of the Estate of Gerard S. Swoboda, Deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

LAW OFFICES OF:

CLIFFORD B. WENTWORTH
1911 Harrison Street
Hollywood, Florida 33020

KRUPNICK & CAMPBELL, P.A.
700 S. E. Third Avenue, Suite 100
Fort Lauderdale, Florida 33316

BUNNELL, DENMAN & WOULFE, P.A.
Post Office Box 22988
Fort Lauderdale, Florida 33335

Respectfully submitted by

JAMES B. DENMAN, ESQUIRE
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW[1]

I. DOES THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS HOLDING THE GOOD SAMARITAN DOCTRINE INAPPLICABLE WHEN THE FAA NEGLIGENTLY CANCELS AN ALERT INITIATED BY IT UNDER THE NATIONAL SEARCH AND RESCUE PLAN WITH REGARD TO AN OCEAN FLIGHT CONDUCTED UNDER INSTRUMENT FLIGHT RULES AND THE POSITIVE CONTROL OF THE FAA AIR TRAFFIC CONTROLLERS, CONFLICT WITH THE SUPREME COURT'S PRONOUNCEMENT AND APPLICATION OF THE GOOD SAMARITAN DOCTRINE IN INDIAN TOWING CO. V. UNITED STATES, 350 U.S. 61, 76 S.CT. 122 (1955)?

II. DOES THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICT WITH DECISIONS OF FEDERAL COURTS OF APPEAL IN LIMITING THE APPLICATION OF THE GOOD SAMARITAN DOCTRINE SOLELY TO UNDERTAKINGS INVOLVING PHYSICAL SEARCH AND RESCUE OPERATIONS?

III. DOES THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY APPLY THE EXCUSE DOCTRINE TO JUSTIFY THE VIOLATION BY THE FEDERAL AVIATION ADMINISTRATION OF ITS OWN REGULATIONS, MANUALS AND ORDERS?

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[1]Parties to the proceedings in the court below are the same as in the caption of the case in this court.

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The Petitioner, by undersigned counsel, respectfully requests that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered on November 23, 1981, reversing the District Court's findings of government negligence.

OPINION BELOW

The District Court Findings of Fact and Conclusions of Law in favor of Petitioner are unreported and set forth in the Appendix. The original panel decision, which held in favor of the Respondent, is reported at 662 F.2d 326 (5th Cir. 1981). A Petition for Rehearing En Banc was filed by the Petitioner and denied as reported at 668 F.2d 532 (5th Cir. 1982). A corrected Order denying the Petition for Rehearing En Banc was denied and is reported at 668 F.2d 532 (5th Cir. 1982). Copies of each opinion and order are included in the Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on November 23, 1981. A Petition for Rehearing En Banc filed by the Petitioner was denied by Order of January 25, 1982. A corrected Order denying the Petition for Rehearing En Banc was rendered March 25, 1982. This Petition was timely filed. The Jurisdiction of this Court is based upon Title 28 U.S.C. §1101(c).

NOTE: Pursuant to Rule 21.1.f of the Rules of the Supreme Court of the United States, the statutes, ordinances and regulations are set forth in the Appendix to this Brief.

In The

SUPREME COURT OF THE UNITED STATES

Misc. No. _____

October Term, 1982

ANNE W. SWOBODA, individually and as personal representative of the Estate of Gerard S. Swoboda, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

STATEMENT OF THE CASE

Gerard Swoboda was a ferry pilot who contracted with Transavia International to ferry aircraft from Taiwan to New Mexico. The part of the route involved herein was to take Mr. Swoboda from Midway Island to Adak, Alaska, located in the Aleutian Chain, a leg of the trip which covered approximately 1,350 nautical miles over the North Pacific Ocean. (PX. 30, 32A).

On September 22, 1975, at 1726 GMT[2] (7:26 A.M.), Mr. Swoboda was last to depart

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[2]Greenwich Mean Time is defined as the mean solar time of the meridian of Greenwich, England, used as the prime basis of standard time throughout the world. Webster's Seventh New Collegiate Dictionary (1963). Greenwich Mean Time in aviation is often referred to as "Zulu" or designated by the letter "Z." For clarity of understanding and uniformity in this brief, all times are referred to in Greenwich Mean Time; documents in evidence that refer to LDT (local daylight time) and BDT (bering daylight time) are 10 hours behind GMT.

Midway Island for Adak, Alaska of three aircraft, each having filed an IFR[3] flight plan[4] for the same route of flight. (R.63-70). The true air speed of Mr. Swoboda's aircraft, a BE-18T "Twin Beech,"

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[3]Instrument Flight Rules; (See 14 C.F.R. §1.2 and §§91.115, 91.116, 91.117, 91.119, 91.121, 91.123, 91.125, 91.127, and 91.129 (1975). For a general discussion of government and pilot liability under Instrument Flight Rules, see Tigert, Instrument Flight Rules (I.F.R.)--The Liability of the Government, 44 J. Air L. & Com. 333-51 (1978); and Johnson, Instrument Flight Rules--Liability of the Pilot, 44 J. Air L. & Com. 353-66 (1978).

[4]A Flight Plan is specified information relating to the intended flight of an aircraft that is filed orally or in writing with an air traffic control facility. See Department of Transportation, Federal Aviation Administration, Airman's Information Manual (Part 1) 1-3 (1975) [hereinafter cited as A.I.M.]; 14 C.F.R. §1.1 (1975). For discussion of IFR flight plan and requirements, see A.I.M. at 1-54, 1-57, and 14 C.F.R. §91.115 (1975). A Flight Plan contains information identifying, among other things, the aircraft and its type, its true airspeed, departure point and destination, route of flight, estimated time enroute, fuel on board, alternate airports, pilot's name, address, telephone number and home base of the aircraft. 14 C.F.R. §91.83 (1975).

FAA Registration No. N3674G, was 170 knots[5] and his enroute altitude 7,000 feet as per Mr. Swoboda's filed flight plan. (PX.1-14; T.62-64). The decedent's companion pilots flew a "Twin Otter," FAA Registration No. N6868 and another BE-18T "Twin Beech," FAA Registration No. N7695C. The flight plan information for Mr. Swoboda, N3674G, showed his estimated time enroute to be eight hours with 11 hours fuel on board and an estimated fuel exhaustion time of 0420 GMT[6] on September 23, 1975 (6:20 P.M., September 22, 1975). (PX.1-14; see pencil page 74, item number 7; and pencil page 128).

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[5]Knot is defined as one nautical mile per hour (one-seventh longer than a statute mile or 6,076 feet).

[6]In Greenwich, England, the date changed to September 23, 1975 at 0000 GMT; locally the date remained September 22, 1975 -- see note 2, supra.

Approximately one hour and twenty-eight minutes after takeoff from Midway, Mr. Swoboda advised Honolulu Center through Honolulu ARINC (Aeronautical Radio Incorporated) that he could no longer transmit on any VHF[7] frequency; he was, however, able to receive VHF transmissions (PX.1-14; see teletype copy of inflight radio contact with Mr. Swoboda as received from Honolulu Aeronautical Radio at 1854 GMT (8:45 A.M.) September 22, 1975, at pencil page 36). Honolulu passed this information on to Anchorage Center at 1955 GMT (9:55 A.M.). (PX.1-14; see statement of James S. Hankins at pencil page 83 and transcript of taped conversations at pencil page 103). At 2036 GMT (10:36 A.M.), three hours and ten minutes after takeoff from Midway, Mr. Swoboda made a position report

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[7]Very High Frequency. 14 C.F.R. §1.2 1975) and PX.26, abbreviations section. For discussion of capabilities and limitations of VHF communication and navigation, see T.279-81; T.64, 67.

to Honolulu ARINC on his HF[8] transceiver giving a position of 37 north, 173-20 west, with an altitude of 7,000 feet and estimating his arrival at the next compulsory reporting point located at 40 north, 173 west to be 2138 GMT (11:38 A.M.). (PX.1-14, see teletype of radio contact by Honolulu Aeronautical Radio with N3674G at pencil page 40). The Federal Aviation Administration Facilities received no further position reports from Mr. Swoboda after that position report at 2036 GMT (10:36 A.M.). (T.68). Mr. Swoboda did not make his position reports at coordinates 40 north, 173 west at 2138 GMT (11:38 A.M.), nor did he make his required position reports at 45 north, 174-20 west, and 50 north, 176 west as per his filed IFR flight plan. (PX.1-14; see flight

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[8]High Frequency. For discussion of capabilities and limitations of HF communication as compared to VHF communications, see (T.267; T.279-81; T.64-67).

plan route at pencil page 69). At 2036 GMT (10:36 A.M.) Mr. Swoboda crossed into the Anchorage flight information region (FIR) and was "passed off" to Anchorage Center to take over positive control of the IFR flight of that aircraft. (PX.1-14; see report of aircraft accident at pencil page 16). The three pilots then established a communication system whereby Mr. Swoboda indicated yes by transmitting one beep on his hand-held emergency locator transmitter and two beeps indicating no. (T.287). However, at approximately 2238 GMT (12:38 P.M.) the use of the portable hand-held emergency locator transmittter significantly changed. At this time Honolulu ARINC communicating with N6868 was informed that radio contact had been lost with N3674G and that every fifteen minutes they were hearing the emergency locator transmitter signal. (PX.1-14; see pencil page 16).

At 0055 GMT (2:55 P.M.) Honolulu ARINC was advised by N6868 that a military airlift command (MAC) aircraft had heard an emergency locator transmitter believed to be from N3674G at 49 north, 171 west. (PX.1-14; see report of aircraft accident at pencil page 16, pencil page 58). This was later communicated to the Federal Aviation Administration authorities in Anchorage. (PX.1-14; see pencil page 116 and communications beginning at 0058 GMT (2:58 P.M.). Anchorage Center misinterpreted this communication as a position report. (PX.1-14; see statement of Carlton L. Schroeder at pencil page 95). In response to information received from MAC Aircraft 50237, Anchorage Center cancelled the INCERFA[9] or uncertainty alert phase

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[9]The terms INCERFA (uncertainty), ALERFA (alert) and DETRESFA (distress) is terminology used in the manual of the International Civil Aviation Organization; the United States is bound by that manual through an international treaty. (T.237-40; see also 5 U.S.C. §551 and 14 C.F.R. §91.1 (1975).

at 0105 GMT (3:05 P.M.) which had been initiated at 0052 GMT (2:52 P.M.). (PX.1-14; see teletype of INCERFA alert and cancellation of alert at pencil page 70). This initial INCERFA was never put on the search and rescue printer to the Search and Rescue Coordinator at Adak, Alaska. (PX.1-14; see statement of Frank Nelson at pencil page 89). Mr. Swoboda's estimated time of arrival at Adak was 0125 GMT (3:25 P.M.) as per his filed flight plan. Mr. Swoboda never arrived at his destination, Adak. (PX.1-14). It was not until 0137 GMT (3:37 P.M.) that the INCERFA alert was again initiated, approximately four hours after communications with Mr. Swoboda were lost. (PX.1-14; see teletype message at pencil page 71). At 0300 GMT (5:00 P.M.) an ALERFA or alert phase was initiated for the overdue aircraft and then at 0450 GMT (6:50 P.M.), the DETRESFA or distress phase of the alert

was initiated, thirty minutes after the calculated fuel exhaustion time of the aircraft, which was 0420 GMT (6:20 P.M.). (PX.1-14; see teletype confirmation of alert and distress phases at pencil page 71).

At 0624 GMT (8:24 P.M.), one hour and thirty-four minutes after the DETRESFA phase of the alert had been activated, search and rescue operations actually began with the launching of a Navy P3 from Adak for an electronic and night search for the missing and overdue aircraft. (T.79). The information supplied to the search and rescue forces in the early stages of the search and rescue operations failed to provide accurate and complete information as to the probable location of the downed aircraft as well as proper and complete flight plan information on N3674G. (PX.1-14; see Search and Rescue Case Study at page 3; T.92-94).

Although N3674G and Mr. Swoboda had been overdue[10] since 2208 GMT (12:08 P.M.) for a position report and overdue at Adak airport since 0155 GMT (3:55 P.M.), at 0635 GMT (8:35 P.M.) Anchorage Center was still requesting flight plan information from Midway. (PX.1-14; see pencil page 73 and teletype request). Eight hours and 27 minutes had elapsed since N3674G was overdue for a position report and four hours and 40 minutes had elapsed since the aircraft was overdue at Adak airport.

On September 27, 1975, a United States Coast Guard aircraft located a yellow life raft at 57-43 north, 174-28 west which was positively identified as belonging to the plaintiff's decedent and pilot

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[10]For definition of "overdue" aircraft see the Enroute Air Traffic Control Manual, Department of Transportation Publication No. 7110.9D, Section 927 (January 1, 1975) (App. 64).

of N3674G, Gerard S. Swoboda. Tethered to the life raft were his suitcase and pilot case containing personal items. (PX.1-14; see Coast Guard Search and Rescue Case Study, at 5). The search and rescue effort continued in an effort to locate Mr. Swoboda, but was suspended at late evening on October 3, 1975, after twelve days of searching had failed to locate either Mr. Swoboda or his aircraft. (PX.1-14; see Coast Guard Search and Rescue Study at 6, ¶11).

The District Court after a non-jury trial found the government negligent through the Federal Aviation Administration, Department of Transportation in failing to promptly report the receipt of an ELT signal from N3674G, failing to promptly report N3674G overdue at Adak, and in failing to transmit the correct location information to the search and rescue coordinator which was a fifty percent (50%) proximate

contributing cause of the death of Gerard Swoboda. (App. 14) (See, ¶34). The United States Court of Appeals, Fifth Circuit, through the Honorable Judge Frank M. Johnson, Jr., with Judge Henderson concurring, reverses the District Court Judge on all three separate findings of government negligence. The Honorable Circuit Judge Thomas A. Clark dissented. The opinion of the United States Court of Appeals, Fifth Circuit, was rendered on November 23, 1981. A Petition for Rehearing En Banc was timely filed and denied by Order of January 25, 1982, and corrected Order of March 25, 1982.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT HOLDING THAT THE GOOD SAMARITAN DOCTRINE APPLIES TO AVIATION SEARCH AND RESCUE EFFORTS ONLY AFTER A PHYSICAL SEARCH HAS BEEN UNDERTAKEN OR COMMENCED, FATALLY PROHIBITS AND PRECLUDES THE APPLICATION OF THAT DOCTRINE TO CONDUCT OF FAA AIR TRAFFIC CONTROLLERS AND IS IN DIRECT CONFLICT WITH THE UNITED

STATES SUPREME COURT'S HOLDING IN INDIAN TOWING CO. V. UNITED STATES, 350 U.S. 61, 76 S.CT. 122 (1955).

The majority in the Court below holds with no more than footnote attention that the Good Samaritan Doctrine is inapplicable to the facts of this case. (App. 36, note 7 of the majority opinion). The majority holds that the issuance of an INCERFA or uncertainty alert pursuant to the National Search and Rescue Plan does not amount to the commencement or undertaking of a search and rescue effort because "the FAA had no control over initiating a physical search," but only provided the Rescue Coordination Center with information as to the missing and overdue aircraft. The decision is of exceptional importance as it will have a major impact upon the legal relationship between the Federal Aviation Administration Air Traffic Controllers and aircraft in distress

while on international transoceanic flights. Petitioner contends that this holding of the majority of the panel in the case at bar is contrary to the pronouncement of the Good Samaritan Doctrine as set forth in the Supreme Court opinion in Indian Towing Company, Inc., v. United States, 350 U.S. 61, 76 S. Ct. 122, 127 (1955).

This Court in Indian Towing Co., v. United States, supra, held that once the Goast Guard had undertaken to provide a lighthouse service and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good order. Therefore, when the light became extinguished the Coast Guard was required to use due care to discover this fact and repair the light or warn that the light was not functioning. When the Coast Guard breached this duty, thereby causing

damages, the United States was held to be liable under the Federal Tort Claims Act. The Indian Towing case has become the leading authority from this Court for what has become known as the "Good Samaritan" Doctrine. Clearly this Court in the Indian Towing Company case held there was a sufficient undertaking by the Coast Guard for liability to attach without the Coast Guard commencing an actual physical search for the vessel that had run aground.

The trial judge applied the "Good Samaritan" Doctrine to this aviation search and rescue case, recognizing that the Fifth Circuit had applied that Doctrine to search and rescue cases involving disabled or distressed vessels because of the negligence of government personnel ashore in evaluating and passing on information. The trial judge properly relied upon United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960) and United States v.

DeVane, 306 F.2d 182 (5th Cir. 1962). Also see, App. 13, ¶¶32, 33. It was held in the Gavagan case that the failure of the rescue effort was due to negligence of government operators ashore in failing to evaluate and pass on vital information and in directing vessels to location under the National Search and Rescue Plan. As Judge Brown put it:

> But the neglect was not in the failure of these two ships "to reach a vessel in distress in time." The neglect was that of persons ashore who were directing the whole operation. Gavagan, supra, at page 321.

Similarly in DeVane the negligence occurred through a breakdown in message transmission resulting in a cancellation of the search. The negligence in DeVane was also of those ashore.

Likewise, in the case at bar the negligence was of the FAA Air Traffic Controllers ashore who were responsible for the positive control of Mr. Swoboda's

aircraft N3674G. Although this is an aviation search and rescue case, the application of the Good Samaritan Doctrine in Indian Towing Company, Gavagan and DeVane, supra, in the admiralty and marine context are applicable here. As the majority opinion points out, the FAA did violate its own regulations, by misinterpreting the MAC flight report of an emergency locator transmitter signal from N3674G as a position report, and cancelling the potentially lifesaving alert thereby preventing any notification of the alert to the Rescue Coordination Center. (PX.1-14; see statement of Frank Nelson at pencil page 89). The resulting delay unduly hampered the search effort with the advent of nightfall and adverse weather. (PX.1-14; see Search and Rescue Case Study ¶¶5, 6, 7, 8 and 9 at pencil pages 5-7). The proper procedure according to the Assistant Chief in Charge at Anchorage

Center is that the alert be put on the search and rescue printer beginning with the INCERFA. (T.208-209). The Enroute Air Traffic Control Manual governing the operations of Anchorage Center at §948 (PX.25; App. 65) and the Terminal Air Traffic Control Manual §1852 (PX.27; App. 66) require that when an emergency locator transmitter is heard or reported the Rescue Coordination Center (RCC) must be notified. An order issued by the FAA similarly provides that when an ELT signal is received or reported it shall be assumed that an emergency exists and that the rescue coordination center shall be immediately notified. (App. 67).

Notwithstanding the mandate of the foregoing manuals and orders published by the Department of Transportation, Federal Aviation Administration and governing its air traffic control facilities, the FAA failed to promptly notify the Rescue

Coordination Center of the MAC flight report by cancelling the original INCERFA or uncertainty alert initiated under the National Search and Rescue Plan. (PX.1-14; see statement of Frank Nelson at pencil page 89).

There is no question but that the FAA has undertaken to provide search and rescue services to pilots under the National Search and Rescue Plan. (App. 68-71). Further, the FAA has advertised that lifesaving service to pilots and engendering reliance upon that service by encouraging the filing of flight plans with this government agency. (App. 68-70). The FAA has assured those pilot beneficiaries of this service that search and rescue procedures will be initiated within 30 minutes if an aircraft becomes overdue or unreported. (See App. 69).

Mr. Swoboda was overdue for a position report for two hours and 44 minutes before the first alert phase was initiated and then cancelled. When the uncertainty alert was again initiated Mr. Swoboda had been overdue for a position report for 3 hours and 29 minutes and had flown approximately 600 nautical miles across the North Pacific Ocean emitting ELT signals as his distress call which went unheeded by Anchorage Center.

Therefore, the "Good Samaritan" Doctrine is applicable to this case. There was a commencement or undertaking by the FAA to provide a service that pilots, including Mr. Swoboda, relied upon and were assured would be provided. Those services were negligently provided in this case. The majority opinion is in conflict with the Indian Towing decision of this Court in holding that the conduct of the FAA in

this case "does not amount to [a] commencement of a rescue" and that the "Good Samaritan" Doctrine is inapplicable to the facts of this case. The majority opinion fatally prohibits and precludes the application of the Good Samaritan Doctrine to the conduct of the FAA Air Traffic Controllers in an aviation search and rescue context by unduly restricting the application of the doctrine to "physical searches." The Petitioner contends that the majority decision by so holding is in direct conflict with this Court's opinion in Indian Towing Co., v. United States, supra. Petitioner invites this Court to determine and clarify the parameters within which the Good Samaritan Doctrine as set forth in the Indian Towing Company case should or should not apply to conduct of the FAA Air Traffic Controllers in an aviation search and rescue context under the National Search and Rescue Plan.

II. THE DECISION BELOW LIMITS THE APPLICATION OF THE GOOD SAMARITAN DOCTRINE SOLELY TO PHYSICAL UNDERTAKINGS IN SEARCH AND RESCUE OPERATIONS AND THUS CONFLICTS WITH OTHER DECISIONS OF FEDERAL COURTS OF APPEAL.

The Promulgation by the FAA of Orders, regulations and directives mandating search and rescue responsibilities for Air Traffic Control personnel constituted an undertaking which was relied upon by pilots. The government was negligent in disregarding those Orders, regulations and directives by cancelling the INCERFA or uncertainty alert initiated under the National Search and Rescue Plan.

Decisions of many Federal Courts of Appeal demonstrate a variety of aviation and marine rescue cases in which the government has taken action or failed to act and been held liable for the resulting breach of duty of due care. See Gill v. United States, 429 F.2d 1072 (5th Cir. 1970); Hartz v. United States, 387 F.2d 870 (5th Cir. 1968); Ingham v. Eastern Airlines, 373 F.2d 227 (2nd Cir. 1967);

Reminga v. United States, 448 F. Supp. 445 (D.C. Mich. 1978) affirmed 631 F.2d 449 (6th Cir. 1980); United States v. DeVane, 306 F.2d 182 (5th Cir. 1962); United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960) cert. denied, 364 U.S. 933 (1961); United States v. Lawter, 219 F.2d 599 (5th Cir. 1955); Yates v. United States, 497 F.2d 878 (10th Cir. 1974).[11] The majority decision below, by restricting the Good Samaritan Doctrine solely to physical undertakings, conflicts with other decisions of other Courts of Appeal applying the Good Samaritan Doctrine.

The government's duty to provide

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[11] The "Good Samaritan Doctrine" has been recognized and utilized in a variety of other factual settings. See Restatement (Second) of Torts §323-324A (1965); Blessing v. United States, 447 F. Supp. 1160 (D.C. Pa. 1978); Jeffries v. United States, 477 F.2d 52 (9th Cir. 1973); Mosley v. United States, 456 F. Supp. 671 (D.C. Tenn. 1978); Robertson v. United States, 382 F.2d 714 (9th Cir. 1967); United States v. Cline, 410 F.2d 1337 (9th Cir. 1969).

services with due care to pilots may rest either upon the requirements of procedure manuals spelling out the functions of its air traffic controllers or upon general pilot reliance on the government for a given service. Hartz v. United States, 387 F.2d 870 (5th Cir. 1968). Thus, the government has been found liable for its breach of the duty of due care in: providing current weather information, Ingham v. Eastern Airlines, 373 F.2d 227 (2d Cir. 1967); failing to provide information about atmospheric conditions, Yates v. United States, 497 F.2d 878 (10th Cir. 1974); for negligence in publishing an aeronautical chart with a tower erroneously located upon it, Reminga v. United States, 631 F.2d 449 (6th Cir. 1980).

In the case at bar, the government's duty rested both upon the manuals, regulations and orders promulgated by the FAA,

and pilot reliance upon the government to provide lifesaving search and rescue services. The FAA issued an Order (App. 67) to its air traffic control facilities which mandated that when an ELT signal is received or reported it must be assumed that an emergency exists. The Terminal Air Traffic Control Manual (App. 72-74, 66) and the Enroute Air Traffic Control Manual (App. 75-80, 65) both make it clear that if the air traffic controller responsible for the aircraft has a doubt as to whether or not an emergency exists, he must treat the situation as though it were an emergency. Therefore, the manuals, regulations and orders clearly imposed a mandatory duty upon air traffic controllers to whom ELT signals were reported. Nevertheless, the FAA violated its own procedural manuals by negligently cancelling the established INCERFA or uncertainty alert initiated under the National Search and Rescue Plan.

The government had no duty to regulate the airspace from Midway to Adak, Alaska. When it did so and advertised to pilots that it would provide search and rescue services, this constituted an undertaking of a nature that would be expected to engender reasonable reliance that those services would be provided to the pilots who fly through that airspace. "It is now well established that when the government undertakes to perform services which in the absence of specific legislation would not be required, it will, nevertheless be liable if those activities are performed negligently." Ingham v. Eastern Airlines, Inc., 373 F.2d 236 (2d Cir. 1967) cert, denied 389 U.S. 931 (1967).

In Reminga v. United States, supra, it was held that although the government is not required to publish aeronautical navigation charts, once it has undertaken to do so and engendered reliance upon them,

the government was then required to use due care to see that it had accurately depicted what its charts purported to show. Thus, the failure to accurately show the location of a tower rendered the United States liable for the injuries to the pilot and passengers who had relied upon the maps for safe navigation of their flight.

In a case analogous to the case at bar, Ingham v. Eastern Airlines, Inc., supra, an FAA procedures manual required that air traffic controllers transmit changes in weather conditions to pilots. This was not deemed to require a report of all changes. However, where the weather did change to reduce visibility by twenty-five percent (25%) and the controllers did not undertake to warn the pilots, the government was deemed to have breached its duty by not taking the actions set forth in the FAA manuals.

Thus, in the case at bar, the regulation of the airspace, as well as the search and rescue procedures employed in initiating an uncertainty alert constituted an affirmative undertaking by the government. Once it had begun the undertaking, the FAA was bound to use reasonable care in the execution of the rescue operation. This duty was breached when the government negligently cancelled the uncertainty alert, in direct conflict with its own rules, manuals and order.

The facts of the case below are easily distinguished from those of Clemente v. United States, 567 F.2d 1140 (1st Cir. 1978), an air traffic controller case. In Clemente the court held that a duty was not derived from the issuance of a mere internal operating memo from a regional director to an employee. The Federal Aviation Act did not require this conduct and it was purely an

internal matter. Thus, there was no reliance upon the memo by the pilots and the FAA was deemed to have acted gratuitously.

In the case at bar, the Airman's Information Manual was widely promulgated and mandatory reading for pilots. Pilots whose lives are at stake must rely that the government will follow its own manuals and regulations, especially those procedures which govern search and rescue responsibilities. (See App. 68-70).

The negligence of the FAA in the case at bar emulates errors made by the Coast Guard in a marine search and rescue in United States v. DeVane, 306 F.2d 182 (5th Cir. 1962). In DeVane the Coast Guard, based upon erroneous information, discontinued a scheduled search. "Thus we see that the critical mistakes were made, not by men taking great personal risk in heroic salvage service under trying conditions, but by those ashore in the

failure to pass on and evaluate vital information." United States v. Gavagan, 280 F.2d 319, 325 (5th Cir. 1960), cert. denied, 364 U.S. 922 (1961). In Swoboda the cancelling of the alert was the first in a series of mistakes by the FAA which delayed the commencement of the physical search and rescue operation, proximately causing the death of Mr. Swoboda.

There is an apparent misunderstanding of the Good Samaritan Doctrine as set forth in Indian Towing for search and rescue cases. Prior to the majority opinion below, it has never been held that the Good Samaritan Doctrine was solely applicable to only those search and rescue operations in which government personnel physically searched for missing, distressed or overdue aircraft.

The Good Samaritan Doctrine has now become unsettled in a variety of marine and aviation rescue contexts. Swoboda has

created an anomaly among the circuits and leaves the question undetermined if the FAA could ever be held negligent in carrying out their search and rescue responsibilities as mandated by the National Search and Rescue Plan (App. 81), the Enroute Air Traffic Control Manual (App. 76-80), and the Terminal Air Traffic Control Manual (App. 82, 73-74, 66).

The actions and inactions of the air traffic controllers in the case below are similar to the Fifth Circuit cases in which the Good Samaritan Doctrine has been applied in the admiralty search and rescue context. Yet, by virtue of the case below, the Fifth Circuit has chosen to tread upon previously virgin territory in holding the FAA responsible only if it commenced a physical search. The novel question of whether this doctrine is solely limited to actual physical undertakings, or as previous case law has suggested, is

applicable in broader fact situations, will reoccur.

Therefore, Petitioner urges this honorable court to grant certiorari to review the opinion below and thereby determine whether or not the Good Samaritan Doctrine should apply to conduct of the government through the Federal Aviation Administration in this case and others which do not involve a physical search and rescue effort by the FAA.

III.

THE FIFTH CIRCUIT'S APPLICATION OF THE EXCUSE DOCTRINE TO EXCUSE THE VIOLATION BY THE FEDERAL AVIATION ADMINSTRATION OF ITS OWN REGULATIONS, MANUALS AND ORDERS, IS IN DIRECT CONFLICT WITH REYES V. VANTAGE STEAMSHIP CO., INC., 558 F.2d 238 (5th Cir. 1977), MODIFIED, 609 F.2d 140 (1980), AND DELTA AIRLINES V. UNITED STATES, 561 F.2d 381 (1st Cir. 1977) BECAUSE NO RECOGNIZED JUSTIFICATION FOR APPLICATION OF THE EXCUSE DOCTRINE IS PRESENT.

1. The Federal Aviation Administration's Disregard for Its Own Regulations Constituted Negligence Per Se.

"The failure of defendant's agents to follow the search and rescue procedures

mandated by defendant's own regulations ... was a proximate cause of decedent's death." (App. 14; ¶35). The petitioner contends that the trial judge properly found that the Federal Aviation Adminstration Air Traffic Controllers had violated their own procedures manuals and order to its air traffic control facilities mandating action when a doubt existed as to whether or not an emergency involving the subject aircraft existed. The majority of the panel in the appeals court below holds that such violations are excused.

The Federal Aviation Administration issued an applicable Order which mandated that when the FAA receives a report of an ELT signal they "shall assume that an emergency exists," and immediately "notify the appropriate Rescue Coordination Center." (App. 67). The Order clearly indicates the duty imposed upon FAA air traffic control facilities. This duty was

breached when upon receiving ELT transmissions, the FAA cancelled the established alert. (T.74). This procedure also violated the Terminal Air Traffic Control Manual, §1800, (App. 72) and the Enroute Air Traffic Control Manual, §907, (App. 75) which requires FAA facilities to consider a situation to be an emergency whenever doubt exists. (App. 14; ¶35; PX.27, 25).[12]

Unlike the discretionary responsibilities of the Coast Guard under Section 88(b), Title 14, of the United States Code; the aforementioned aviation order and regulations mandate specific compliance by the FAA when circumstances exist such as those surrounding Gerard Swoboda's flight from Midway to Adak, Alaska.

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[12]Although the trial judge relied on the Terminal Air Traffic Control Manual in his Conclusions, the Enroute Air Traffic Control Manual applies to enroute procedures. The provisions in each manual are identical, however.

In Marshall v. Isthmian Lines, Inc., 334 F.2d 131 (5th Cir. 1964), the Fifth Circuit discussed the theory of negligence per se. "The law is well established that violation of a statute which is intended to protect the class of persons to which a plaintiff belongs against the risk of the type of harm which has in fact occurred is negligence in itself." Id. at 134 (citations omitted), cited with approval in Reyes v. Vantage Steamship Co., 558 F.2d 238 (5th Cir. 1977). In order to apply this theory, the court proposed three questions for determing negligence per se:

> "(1) What proof makes out a violation of the regulations?
>
> (2) Were the regulations designed to protect ... [pilots]?
>
> (3) Were they intended to protect against the risk of the kind of harm that occurred here ...?"

Id. This three-part test may be easily

applied to the facts in the present case. First, the order and manuals issued by the FAA establishes the procedures to be followed when in receipt of ELT transmissions. The procedure requires the immediate notification of "the appropriate rescue coordination center ...." (App. 65-67, 74, 78-79). The government failed to do this, accepting the military aircraft flight's report of ELT transmissions as a position report, when in reality this signaled an emergency. (T. 74).

Second, there can be no doubt that this order was designed to protect pilots who encounter in-flight difficulties. The requirement of prompt notification assures pilots of the watchfulness of the Federal Aviation Administration.

Third, prompt rescue procedures were designed to effectuate a successful rescue of a pilot in the event of a crash. The timeliness of the rescue was obviously

recognized as a relevant factor in securing the safe rescue of crash survivors.

Thus, the three-part test is satisfied, demonstrating the existence of negligence per se on behalf of the government. It was, therefore, proper for the Honorable Trial Judge to have held the government liable for abandoning its own rules and regulations proximately causing the death of Gerard S. Swoboda.

2. The Majority Has Misapplied The Excuse Doctrine In Conflict With The Reyes And Delta Airlines Decisions And Established And Settled Legal Principles.

The broad sweeping application of the excuse doctrine by the majority is of exceptional precedential importance in every case hereafter decided in which negligence per se is established by showing statutory violations which are claimed to be excused.

The majority holds that Anchorage Center reasonably believed that Swoboda's

ELT signal was not intended to indicate a distress because (1) three or four ELT signals are heard each day and not every report of an ELT signal means an aircraft is in distress, (2) Mr. Swoboda's companions told Anchorage Center the ELT signals were a method by which Swoboda indicated he was "o.k.," (3) the companion pilots had made position reports for Swoboda on at least two prior occasions, (4) Swoboda used an intermittent ELT signal rather than a continuous distress signal, and (5) decedent's companion pilots informed Anchorage Center that Swoboda had probably gone to his alternate destination at Cold Bay. The majority relies solely upon Reyes v. Vantage Steamship Co., Inc., supra, as authority for application of the excuse doctrine in this case.

In Reyes it was held a mistaken belief by a ship's captain that compliance with a safety statute was not required, was not

sufficient justification for failure to comply with it. Likewise mistaken assumptions by the FAA based on misinterpretation of information provided by decedent's companion pilots as a position report for Mr. Swoboda's aircraft and based on misinformation provided by Mr. Swoboda's companion pilots should not justify violation by the FAA of its regulations, manuals and orders mandating action. (See dissenting opinion at App. 43-58).

The court in Reyes held strict compliance can be excused due to an emergency situation or where compliance is more dangerous than noncompliance. Petitioner contends the majority applies the "excuse doctrine" without recognizing or defining its limitations as they may be applicable to this case and others in the future. There was no emergency and no danger to preclude the FAA following its own

manuals and order in this case.

Assuming that the government's reliance upon the companion pilots' initial assurances that Mr. Swoboda was "o.k." excused their negligence as early as 2245 GMT (12:45 P.M.), continued reliance upon them became misplaced and unreasonable to justify and excuse the FAA's violations of its own directives. Swoboda had now been overdue for his second compulsory position report since 2208 GMT (12:08 P.M.). Unable to make radio contact with Mr. Swoboda, Honolulu Center contacted the companion aircraft N6868 requesting N3674G's position. However, neither of the two companion pilots were able to contact Mr. Swoboda thereafter. Neither companion pilot ever sighted Swoboda's aircraft after 1900 GMT (9:00 A.M.). (PX.1-14; see statement of Transavia International attached to Pilot/Operator Aircraft Accident Report). From this point

forward surely the FAA was bound to initiate and conduct emergency procedures in accordance with its own applicable regulations, manuals and order.

The application of the excuse doctrine to excuse the FAA's negligent violation of its regulations, manuals and order represents a serious departure from the accepted and usual course of judicial application of the excuse doctrine.

The excuse doctrine has experienced traditional application in four rather specific areas. W. Prosser, Handbook of the Law of Torts (4th ed. 1971) pp. 198-99. The first category concerns excusing negligent violations of a statute where there existed circumstances beyond the tortfeasor's control. Prosser, at 198. The majority of cases in this area deal with vehicle drivers who have experienced sudden mechanical difficulties such as brake failure, Hills v. McGillvrey,

240 Or. 476, 402 P.2d 722 (1965); or headlight failure on a highway at night, Brotherton v. Day & Night Fuel Company, 192 Wash. 362, 73 P.2d 788 (1937).

The second area has excused statutory violations where the tortfeasor was innocently ignorant of the operative facts which made the statute applicable. Prosser, Handbook of the Law of Torts (4th ed. 1971) at 199. Traditional examples of this have included such cases as a driver's ignorance that he was at an intersection controlled by traffic signals, Baldwin v. Washington Motor Coast Co., 196 Wash. 117, 82 P.2d 131 (1938); and a driver's ignorance that he was at a railroad crossing, Johnson v. Chicago & N.W. Ry.Co., 71 S.W. 132, 22 N.W.2d 725 (1946).

The third category of cases applying the excuse doctrine involves the existence of a genuine emergency situation. Prosser, Handbook of the Law of Torts (4th ed. 1971)

at 199. Typical cases applying the doctrine in this regard include emergency situations where drivers have been forced to take immediate reactionary measures to avoid danger, such as illegally driving in the left lane when the right lane has suddenly become blocked, Conder v. Griffith, 61 Ind. App. 218, 111 N.E. 816 (1916); changing lanes to avoid a child dashing into the street, Chase v. Tingdale Bros., 127 Minn. 401, 149 N.W. 654 (1914); and in any situation where there is a real necessity to act in violation of the law. Giancarlo v. Karabanowski, 124 Conn. 223, 198 A. 752 (1938). In regard to the latter requiring a real necessity, however, "[t]he emergency must of course be such that there is no reasonable opportunity to obey the statute." Prosser, Handbook of the Law of Torts (4th ed. 1971) at 199, n. 9; citing, Toothaker v. Hines, 112 Kan. 304, 210 P. 1110 (1922).

The final category of precedent excusing negligent statutory violations involves situations where it would have been more dangerous to comply with the statute than not. Prosser, Handbook of the Law of Torts (4th ed. 1971) at 199. Examples in this area include situations where pedestrians have been forced either to walk on the wrong side of a road where all the heavy traffic was on the other side, Tedla v. Ellman, 280 N.W. 124, 19 N.E.2d 987 (1939); or to walk on the wrong side of the road where the sidewalk on the other side was dangerously defective, Cameron v. Stewart, 153 Me. 47, 134 A.2d 474 (1957).

The only aviation case found by Petitioner in which the excuse doctrine was considered as a possible justification for violation by FAA air traffic controllers of their own procedures manuals is Delta Air Lines, Inc. v. United States,

561 F.2d 381 (1st Cir. 1977). In this case it was held that even an emergency requiring the immediate and concentrated attention of the controller, once defused, was thereafter no longer a legal excuse for failing to deal properly with all aircraft under his control and comply with mandatory provisions of the air traffic control manuals. This included the Delta flight. The court found the controller's violation of the FAA manual provisions to be negligence per se and the emergency did not justify or excuse the violation. The FAA in this case violated mandatory manual provisions and an order but the majority holds this conduct is excused even though there was no emergency or other recognized legal excuse for such conduct.

Petitioner contends that the majority below applied the excuse doctrine to dispell the FAA's violation of its own regulations, manuals, and order without any legal

justification in law or fact. Petitioner invites this honorable court to exercise its supervisory powers to curb this depature from the proper application of the excuse doctrine.

CONCLUSION

For the foregoing reasons, Petitioner urges this Court to grant this Petition for Writ of Certiorari and set this case down for consideration on the merits with briefs and oral argument.

Respectfully submitted,

BUNNELL, DENMAN & WOULFE, P.A.
1080 Southeast Third Avenue
Post Office Drawer 22988
Fort Lauderdale, Florida 33335
(305) 761-8600

By: JAMES B. DENMAN
Attorney for Petitioner

April 24, 1982

Appendix

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 77-6390-CIV-JAG

ANNE W. SWOBODA, individually, and as the Personal Representative of the Estate of GERARD S. SWOBODA, deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came before the Court for trial on June 21, 1979. The Court having considered the testimony and evidence and having heard the argument of counsel, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. PARTIES

1. This action was brought by plaintiff, Anne W. Swoboda, as personal representative of the estate of Gerard S. Swoboda, deceased.

2. Defendant is the United States of America. At all times material hereto, the Federal Aviation Administration was a duly authorized branch and agent of the defendant.

3. At all times material hereto, plaintiff was the lawfully wedded spouse of the decedent, Gerard S. Swoboda, and is the duly appointed personal representative of the estate of Gerard S. Swoboda.

4. Decedent was an experienced pilot with an Air Line Transport Pilot's license.

B. HISTORY

5. On September 22, 1975, decedent was the pilot and sole occupant of a Beechcraft BE-18 Twin Engine Airplane,

N3674G, which was owned by Air American, Inc., and which departed from Midway Island on an Instrument Flight Plan in route to Adak, Alaska at approximately 1726 Greenwich Mean Time (GMT) under a ferry contract with Transavia International.

6. N3674G's estimated time of arrival at Adak was 0126 GMT or eight hours after take off. The aircraft had eleven hours of fuel on board and was traveling at an air speed of 170 knots.

7. Two companion aircraft under the same ferry contract with Transavia International, and with the same approximate flight plan, also departed Midway Island; N6868 departed at 1637 GMT and N7695C departed at 1719 GMT.

8. Immediately after take off, N3674G began having transmission problems with its VHF radio. At 1853 GMT decedent advised Honolulu Control Tower that he was

unable to transmit on any VHF frequency but was able to receive.

9. At 1955 GMT Honolulu Control transferred control of N3674G to Anchorage Center and communicated the status of the aircraft's communication equipment.

10. At 2036 GMT N3674G reported his position to Honolulu as 37°N, 173'20"W, estimating 40°N,173°W at 2138 GMT. This was the last position report made by decedent and his last contact with Honolulu.

11. At 2238 GMT Honolulu received a communication from decedent's companion aircraft, N6868, advising it had lost radio contact with N3674G, but was receiving intermittent signals from N3674G's portable Emergency Locator Transmitter (ELT) indicating decedent was all right. N6868 stated he assumed N3674G was all right since there had been no distress

call. A portable ELT is a hand-held battery powered unit which has a limited range.

12. On September 23, 1975, at 0052 GMT, Anchorage Control issued an uncertainty phase (INCERFA) when N3674G did not report.

13. At 0055 GMT N6868 reported talking to a MAC Flight 50237. The MAC aircraft had heard an intermittent ELT signal at 0040 GMT estimated at 49°N, 171°W which N6868 assumed to be N3674G. At that time, Anchorage cancelled the uncertainty phase on N3674G, assuming that the MAC report was a position report rather than a distress.

14. At 0137 GMT the uncertainty phase on N3674G was reissued and Anchorage Control contacted various air carriers in the vicinity of N3674G requesting information on the missing aircraft.

15. N7695C continued to hear an

intermittent ELT signal assumed to be N3674G until N7695C was approximately 100 miles from Adak, at which time the ELT signal was lost.

16. When the first companion aircraft landed in Adak, the pilot advised that N3674G probably took its alternate route to Cold Bay. Adak contacted Cold Bay at 0253 GMT and requested any information they had on the missing flight. N3674G's estimated arrival time at Cold Bay, assuming alternate destination, was calculated to be 0259 GMT. It was also estimated that N3674G would run out of fuel at 0420 GMT.

17. At 0300 GMT, an Alert (ALERFA) was issued on N3674G, and transmitted to Search and Rescue. At 0340 GMT Anchorage directed area communication centers to broadcast directional information on various channels on the chance that N3674G might still be able to receive. Anchorage

also contacted air fields and bases in the vicinity seeking information on the missing aircraft.

18. A Distress (DETRESFA) was issued on N3674G by Anchorage at 0450 GMT September 23, 1975, and at 0625 GMT a Navy P-3 was launched by Search and Rescue from Adak to begin the rescue operation. Search and Rescue received inaccurate position information from Anchorage regarding N3674G, resulting in the P-3 searching along the wrong coordinates. Several hours later, Search and Rescue received corrected position information indicating an area 700 miles south of the initial search coordinates.

19. On September 27, 1975, a life raft identified as belonging to N3674G was located approximately 18 miles south of Adak, in the vicinity of Atka Island. Tethered to the life raft were decedent's

suitcase and pilot case. There was no evidence that decedent had used any of the survival gear in the raft. After twelve days of searching, involving eleven aircraft and six vessels searching for 600 hours over an area 300,000 square miles of the North Pacific Ocean, Bering Sea, Aleutian Islands, and coastal areas of Southwestern Alaska, the search was cancelled without locating either decedent or the aircraft.

C. SAFETY PROCEDURES

20. FAA Order N.6050.29 (November 19, 1973) and FAA's Terminal Air Traffic Control Manual (January 1, 1975) both provide that when an ELT signal is received or reported, it shall be assumed that an emergency exists and FAA facilities shall immediately notify the appropriate rescue coordination center. The Terminal Air Traffic Control Manual also provides, at

No. 1800, that when a doubt exists as to whether a given situation constitutes a potential emergency, the situation should be handled as though it is an emergency.

21. The normal procedure for transmission of an emergency signal is to turn the ELT on and leave it on continuously. There is no provision in the manuals for using an ELT as a communication device.

22. The National Search and Rescue Plan is a life saving service provided through the combined efforts of the FAA, Air Force, Coast Guard and other state and local agencies. The service provides search, survival aid and rescue of personnel of missing or crashed aircraft.

23. Had defendant's agents acted in accordance with FAA regulations and instituted rescue procedures upon receipt of the report that N3674G was transmitting an ELT signal, the greater weight of the

evidence indicates that decedent could have been located and assisted.

24. Had defendant's agents declared a Distress phase (DETRESFA) when decedent's aircraft was overdue at Adak, Alaska as calculated from N3674G's flight plan, and a search and rescue operation initiated at that time, the greater weight of the evidence discloses that decedent's aircraft could have been located and decedent assisted.

25. Had defendant's agents transmitted the proper position information on N3674G to the Search and Rescue Coordination Center when the search operation began, the greater weight of the evidence is that decedent could have been located and assisted.

26. Had decedent turned on his ELT and left it on continuously, rather than sounding the device intermittently and

using it as a communication tool, the greater weight of the evidence indicates that defendant's agents would have immediately initiated a search and rescue operation and decedent would have been located and assisted.

D. DAMAGES

27. Decedent was born on February 15, 1946 and was 29 years of age when his plane was reported missing. Plaintiff, Anne Swoboda, was born on December 3, 1944, and is presently 34 years old. Plaintiff and decedent had no children.

28. The Department of Health and Welfare of the State of Alaska issued a Certificate of Presumption of Death on April 29, 1976 indicating that decedent was presumed dead on September 22, 1975.

29. The joint income tax returns for Gerard and Anne Swoboda for the year 1973 reports an adjusted gross income of $11,425;

an adjusted gross income of $15,233 for the year 1974. Plaintiff's Exhibit 15 discloses that in 1973 decedent listed his occupation as "Self-employed" with Schedule C (Form 1040) indicating a net profit of $2,457. The 1974 Schedule C (Form 1040) shows a net loss of $136.00. The respective Form 1040's further show separate employment income for decedent for each of these years respectively.

30. Decedent's life expectancy, according to the applicable life expectancy tables, was 72 years, with a work life expectancy at the time of his death of 35.4 years.

CONCLUSIONS OF LAW

31. The Court has jurisdiction in this action pursuant to The Death on the High Seas Act, 46 U.S.C §761 et seq. and The Federal Tort Claims Act, 28 USC §1346 et seq., as well as 46 U.S.C. 781-790

relating to admiralty claims against the United States.

32. The decision to undertake or abandon a rescue is discretionary with the government agencies who participate in the National Search and Rescue plan. However, having undertaken the rescue and engendered reliance thereon, the obligation arises to use reasonable care in carrying out the rescue. Negligence in the operation of a rescue creates liability if it is the proximate cause of loss or damage where the position of one is worsened in reliance on the undertaking by the agency. U.S. v. DeVane, 306 F.2d 182, 186 (5th Cir. 1962).

33. The discretionary nature of the decision to undertake a rescue does not alter the duty owed by those in command of the rescue ashore during the operation of the rescue. U.S. v. Gavagan, 280 F.2d 319, 328 (5th Cir. 1960).

34. The negligence of the defendant's agents in failing to promptly report receipt of the ELT signal from N3674G and to promptly report N3674G overdue at Adak, and in failing to transmit the correct location information to the Search and Rescue Coordinator was a proximate cause of decedent's death.

35. The failure of defendant's agents to follow the search and rescue procedures mandated by defendant's own regulations as set out in paragraph 20 above was a proximate cause of decedent's death, particularly since such regulations require that when a doubt exists as to the existence of an emergency it should be presumed to be an emergency.

36. Decedent's failure to return to Honolulu upon discovery of the failure of his VHF equipment and decedent's failure to use the ELT to transmit a continuing signal were also proximate causes of his

death, which negligence was a 50% proximate contributing cause of his death.

37. Plaintiff's damages resulting from the death of Gerard S. Swoboda are $450,000.00, of which defendant is liable for 50%.

Accordingly, it is

ORDERED AND ADJUDGED as follows:

1. That judgment be entered for the plaintiff and against the defendant in the sum of $225,000.00.

2. That plaintiff should furnish an appropriate form of final judgment for entry herein within seven (7) days from the date hereof.

DONE AND ORDERED in the U. S. District Courthouse, Fort Lauderdale, Florida, this 26th day of July, 1979.

/s/ Jose A. Gonzalez, Jr.
U. S. District Judge

Anne W. SWOBODA, individually and as the Personal Representative of the Estate of Gerard S. Swoboda, Deceased, Plaintiff-Appellee Cross-Appellant,

v.

UNITED STATES of America, Defendant-Appellant Cross-Appellee.

No. 79-3665.

United States Court of Appeals, Fifth Circuit.*
Unit B

Nov. 23, 1981.

Wife of pilot filed a wrongful death action under Federal Tort Claims Act and the Death on the High Seas Act alleging that the Federal Aviation Administration proximately caused the death of her husband by negligently failing to institute proper rescue procedures after his plane crashed off the coast of Alaska. The United States District Court for the Southern District of Florida, Jose A. Gonzalez, Jr., J. found

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

that both Government and decedent were negligent and that the negligence of each was a 50% proximate cause of death, and cross appeals were taken. The Court of Appeals, Frank M. Johnson, Jr., Circuit Judge, held that: (1) even if failure of FAA officials to notify appropriate rescue coordination center when ELT signal was received in violation of FAA regulation constituted negligence per se, the violation was, under the circumstances, excusable where facts surrounding ELT transmission demonstrated that FAA facility reasonably believed that the signal was not intended to indicate distress; (2) FAA exercised reasonable care in notifying proper authorities of pilot's difficulties after pilot's aircraft was overdue and failed to make position report; and (3) even if FAA negligently supplied incorrect location coordinates to rescue coordination

center, the negligence did not proximately cause pilot's death.

Reversed.

Thomas A. Clark, Circuit Judge, filed dissenting opinion.

1. Negligence 6

To constitute negligence per se there must be a violation of a regulation causing type of harm that regulation was intended to prevent and injuring a member of the class of persons intended to be protected by the regulation; finding of negligence per se does not, however, terminate the inquiry since a court must determine whether violation of regulation was somehow rendered excusable.

2. Aviation 232.5

Even if failure of FAA officials to notify appropriate rescue coordination center when ELT signal was received in violation of FAA regulation constituted

negligence per se, the violation was, under the circumstances, excusable where facts surrounding ELT transmission demonstrated that FAA facility reasonably believed that the signal was not intended to indicate distress.

3. Aviation 232.5

Duties of FAA air controllers are set forth in various air controlling manuals and violation of those duties can constitute negligence.

4. Aviation 232.5

FAA exercised reasonable care in notifying proper authorities of pilot's difficulties after pilot's aircraft was overdue and failed to make position report.

5. Aviation 232.5

A duty to supply complete information to rescue coordination center does not require FAA to warrant accuracy of the data; only if inaccuracy resulted from a

failure to exercise reasonable care may FAA be found negligent for transmitting incorrect data to rescue coordination center.

6. Aviation 232.5

Even if FAA negligently supplied incorrect location coordinates to rescue coordination center, the negligence did not proximately cause pilot's death.

Ronald R. Glancz, Aviation Unit, Torts Section, U. S. Dept. of Justice, Susan A. Ehrlich, Anthony J. Steinmeyer, Linda Jan S. Pack, U.S. Dept. of Justice, Civ. Div., Appellate Staff, Washington, D. C., for defendant-appellant cross-appellee.

Bunnell & Denman, James B. Denman, Fort Lauderdale, Fla., Clifford B. Wentworth, Hollywood, Fla., for plaintiff-appellee cross-appellant.

Appeals from the United States

District Court for the Southern District of Florida.

Before FRANK M. JOHNSON, Jr., HENDERSON and THOMAS A. CLARK, Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

Plaintiff Anne Swoboda filed a wrongful death action under the Federal Tort Claims Act, 28 U.S.C.A. §1346 et seq., and the Death on the High Seas Act, 46 U.S.C.A. § 761 et seq., alleging that the Federal Aviation Administration (FAA) proximately caused the death of her husband, Gerard Swoboda, by negligently failing to institute proper rescue procedures after the decedent's plane crashed off the coast of Alaska. The district court found in a non-jury trial that both the government and the decedent were negligent and that the negligence of each was a 50 percent proximate cause of death. The Government appeals and the plaintiff cross-appeals, each

contending that the other's negligence was the sole proximate cause of death. Because we conclude that the district court's findings of negligence on the part of the government are clearly erroneous, we reverse.

Gerard Swoboda, an experienced pilot, contracted with Transavia International to ferry from Taiwan to New Mexico via Midway Island and Adak, Alaska. Prior to his fateful trip, Swoboda had twice flown aircraft successfully over the identical route. On September 22, 1975, at 17:26 Greenwich Mean Time (GMT), Swoboda's and two other aircraft flying the same route departed Midway for Adak. Swoboda's flight plan indicated that the trip would take eight hours, that his estimated time of arrival at Adak was 01:26 GMT, that his plane contained enough fuel for eleven hours of flight and that his alternate destination in the event that Adak could

not be reached was Cold Bay, Alaska. Ninety minutes after takeoff, Swoboda advised Honolulu Aeronautical Radio (ARINC) that he was experiencing difficulties with his radio and could no longer transmit on Very High Frequency (VHF), but retained the ability to transmit on High Frequency (HF).[1] Because of these transmission difficulties, Swoboda communicated with the other two planes by pressing his hand-held Emergency Locator Transmitter (ELT) once to signify

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1. Radio communication on VHF or very high frequency is limited to a pilot's line-of-sight and is therefore only effective over relatively short distances. According to an expert witness for the Government, Swoboda would have been able to transmit on VHF approximately 80 or 90 miles. HF or high frequency permits a pilot to communicate at a much greater distance than on VHF. The expert testified that a plane can transmit 2000 or even 3000 miles on HF but cannot use HF to communicate short distances of a hundred miles or less.

"yes" and twice to signify "no".[2] At 19:55 GMT, responsibility for monitoring the planes was transferred from Honolulu to the Anchorage Air Route Traffic Control Center (Anchorage Center) although the planes remained in contact with Honolulu. Swoboda made a required position report to Honolulu at 20:36 GMT on HF and estimated that he would arrive at the next compulsory reporting position in an hour. That was the last verbal message received from Swoboda. At the next compulsory reporting position, one of the companion aircraft notified Honolulu ARINC that operations for the

2. 49 U.S.C.A. §1421 requires all aircraft to be equipped with an Emergency Locator Transmitter (ELT). After an accident, the ELT emits a continuous audio tone which allows the location of the downed aircraft to be determined. Swoboda's plane contained both an ELT attached to the plane's tail and a portable ELT that could be manually operated. Although the matter is not entirely clear from the record, it was apparently impossible for Swoboda to transmit verbal communications with his ELT.

three planes were normal.

Five hours outside of Midway, at 22:38 GMT, one of the companion planes wired Honolulu that Swoboda no longer had transmission capabilities on either HF or VHF but that he was not in difficulty since no distress signal had been heard. Honolulu was also informed that Swoboda has been communicating with the planes by turning his portable ELT on and off.[3] At 00:40 GMT, less than an hour before Swoboda's projected arrival time at Adak, a military aircraft heard an ELT signal emanating at fifteen minute intervals. The military

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3. The loss of transmission capabilities on Swoboda's radio apparently had no effect on his ability to transmit signals with his Emergency Locator Transmitter. Although the record is not entirely clear on this point, Swoboda's portable ELT appears to have been a self-contained unit, with transmission capabilities and a power source wholly apart from the aircraft's radio. Thus the total failure of Swoboda's radio did not deprive Swoboda of the ability to send signals with his portable ELT.

aircraft contacted the other two planes, informed them of the intermittent signal and gave the coordinates for the location of the strongest ELT signal. At 00:52 GMT, FAA officials at Anchorage Center issued an INCERFA or "uncertainty" bulletin concerning Swoboda's plane because of his failure to make a position report. Three minutes after the "uncertainty" bulletin, at 00:55 GMT, one of the companion planes notified Anchorage Center that the military aircraft had heard an ELT signal emanating from Swoboda's aircraft but that the signals were Swoboda's "way of telling us he [is] ok." As a result of the message from the companion plane that Swoboda was not in distress, Anchorage Center cancelled the INCERFA. The INCERFA was reinstated 45 minutes later after Swoboda was again overdue for a position report. The companion planes landed at Adak and the pilots

informed FAA officials at Anchorage Center that Swoboda had probably flown to the alternate destination, Cold Bay. At 03:00 GMT, shortly after Swoboda's estimated arrival time at Cold Bay, an ALERFA or "alert" bulletin was issued concerning the missing plane and at 04:50 GMT, 30 minutes after the estimated exhaustion of Swoboda's fuel, a DETRESFA or "distress" bulletin was issued.

The Search and Rescue Coordinator at Adak dispatched a Navy P-3 aircraft equipped with sophisticated electronic and night search equipment in an attempt

to locate Swoboda's ELT signal.[4] FAA officials at Anchorage Center had, however, provided the rescue coordination center with the incorrect coordinates for Swoboda's location, causing the Navy P-3 to begin

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4. The Search and Rescue Coordinator oversees rescue operations under the National Search and Rescue Plan (SAR). The SAR is an agreement between various government agencies and departments that seeks to effectively utilize all available federal facilities for search and rescue operations. The plan creates three regions——inland, overseas and maritime——and names a particular agency or military branch as the SAR coordinator for each region. The Coast Guard is the maritime region coordinator while the Air Force is the inland region coordinator. The plan permits the establishment of rescue coordination centers in the territorial subdivisions of each region. The rescue coordination center is responsible for coordinating and, where appropriate, directing the SAR facilities on a search and rescue operation. In re American Oil Co., 417 F.2d 164, 169-70 (5th Cir. 1969); United States v. Gavagan, 280 F.2d 319, 322 (5th Cir. 1960), cert. denied, 364 U.S. 933, 81 S.Ct. 379, 5 L.Ed.2d 365 (1961). During the initial stages, it appears from the record that search and rescue operations for Swoboda's plane were coordinated by the United States Navy at Naval Station Adak. However, the duties of coordinating the search were later transferred to the Coast Guard.

searching 700 miles north of Swoboda's last reported position. The following day, six aircraft were utilized over a broad area, again in a vain attempt to locate an ELT transmission. On September 27, after five days of search and rescue operations, a Coast Guard aircraft sighted a yellow life raft belonging to the downed pilot 18 miles south of Adak. The search was narrowed to the general vicinity of the raft and searches of the nearby islands were implemented. After twelve days, search and rescue operations were discontinued without having located Swoboda. The entire search, which involved eleven aircraft and six vessels, covered an area of over 300,000 miles. The district court found that the government's agents were negligent for violating FAA regulations by failing to promptly notify the Search and Rescue Coordinator after receiving the report from

a companion plane that the military aircraft had heard Swoboda's ELT signal, for failing to promptly report to the Search and Rescue Coordinator that Swoboda was overdue at Adak and for failing to supply the Search and Rescue Coordinator with the correct coordinates for Swoboda's last known position. The court concluded that the government's negligence constituted a 50 percent proximate cause of death and awarded a judgment for the plaintiff in the amount of $225,000.

[1,2] Plaintiff contends that the failure of Anchorage Center to notify the Search and Rescue Coordinator of the report received from the military aircraft concerning Swoboda's ELT signal violated FAA regulations and amounted to negligence per se. To constitute negligence per se, (1) there must be a violation of a regulation; (2) causing the type of harm that

the regulation was intended to prevent; and (3) injuring a member of the class of persons intended to be protected by the regulation. Manning v. M/V "Sea Road," 417 F.2d 603 (5th Cir. 1969); Marshall v. Isthmian Lines, Inc., 334 F.2d 131 (5th Cir. 1964). A finding of negligence per se does not, however, terminate the inquiry. A court must determine whether the violation of the regulation was somehow rendered excusable. Reyes v. Vantage Steamship Co., Inc., 558 F.2d 238 (5th Cir. 1977), modified, 609 F.2d 140 (1980). Regulations require FAA facilities to notify the appropriate rescue coordination center when an ELT signal is received or

reported.[5] Further, FAA officials are required to treat a situation as an emergency whenever doubt exists.[6] By

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5. An order issued by the Federal Aviation Administration states in pertinent part:

> a. When an ELT signal is received or reported, it shall be assumed that an emergency exists. FAA facilities shall immediately notify the appropriate rescue coordination center in accordance with procedures currently prescribed...

Order No. 6050.29 of the Department of Transportation, Federal Aviation Administration (Nov. 19, 1973).

For a definition of rescue coordination center, see note 4, supra.

6. The En Route Air Traffic Control Manual states in pertinent part:

> When you [the air traffic controller] believe an emergency exists or is imminent, select and pursue a course of action which appears to be most appropriate under the circumstances and which most nearly conforms to the instructions in this manual. If you are in doubt that a given situation constitutes a potential emergency, handle it as though it were an emergency.

Department of Transportation Publication # 7110.9D, § 907 (Jan. 1, 1975).

failing to notify the rescue coordination center of Swoboda's ELT signal, FAA officials did, in fact, violate the express language of the regulation. Assuming without deciding that the violation of the regulation amounted to negligence per se, we find that the violation was, under the circumstances, excusable.

The facts surrounding Swoboda's ELT transmission demonstrate that Anchorage Center reasonably believed that the signal was not intended to indicate distress. The Assistant Chief in Charge at Anchorage Center testified that Anchorage Center receives three or four reports of ELT signals daily and that not every report of an ELT signal means that an aircraft is in distress. The signal emanating from Swoboda's plane had been heard by a military aircraft and reported to one of the companion planes. The companion plane informed Anchorage Center of the ELT signal but also stated that Swoboda was

using the ELT not as a distress signal but as a method of indicating that he was "ok". FAA officials knew that Swoboda's radio was not functioning, knew that he had been using his ELT transmitter to communicate with the other two pilots and knew that on at least two prior occasions one of the companion planes had made position reports for Swoboda. Thus it was reasonable for FAA officials to rely upon the companion plane's message that Swoboda's ELT transmission did not signify distress but was instead a means of communicating. Additionally, the ELT transmission occurred at 15-minute intervals although the proper procedure for indicating distress is to employ a continual transmission. While the use of an intermittent signal may have been a reasonable means of conserving limited battery power, the absence of a continual transmission reinforced Anchorage Center's

conclusion that Swoboda was communicating with the other planes as planned through the use of his ELT and not signaling distress.

[3,4] The Plaintiff also avers that FAA officials were negligent for failing to notify the Search and Rescue Coordinator when Swoboda's plane was overdue at Adak and for supplying the rescue control coordinator with incorrect location

information.[7] The duties of FAA air controllers are set forth in the various air controller manuals and violation of those duties can constitute negligence. See Dickens v. United States, 545 F.2d 886, 892 (5th Cir. 1977); Gill v. United States,

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7. Plaintiff also argues that the FAA negligently delayed the search and rescue operation by canceling the first INCERFA or "uncertainty" bulletin in violation of the Good Samaritan Doctrine. Although having no duty to implement a search or rescue, the government can be liable under the Good Samaritan Doctrine if a search is negligently performed, the negligence results in a worsening of the condition of the person in distress and there is a reliance on the rescue operation. United States v. DeVane, 306 F.2d 182 (5th Cir. 1964). Plaintiff avers that the FAA commenced a search and rescue operation by issuing an INCERFA and can therefore be liable under the doctrine. The issuance of an INCERFA, however, does not amount to the commencement of a rescue. The Assistant Chief in Charge at Anchorage Center testified that the FAA had no control over initiating a physical search and simply supplied the appropriate rescue coordination center with information concerning the missing or overdue aircraft. Thus, the Good Samaritan Doctrine is inapplicable to the facts of this case. Even were the doctrine applicable, however, the government would not be liable since the plaintiff has failed to prove any negligence on the part of the FAA.

429 F.2d 1072, 1075 (5th Cir. 1970); accord, Zabala Clemente v. United States, 567 F.2d 1140, 1147 (1st Cir. 1977). The manual states that the FAA has the responsibility for assuring that search and rescue operations will be initiated if an aircraft is overdue or fails to make position reports.[8]

8. The En Route Air Traffic Control Manual states in pertinent part:

——The National SAR Plan assigns search and rescue responsibilities as follows:

a. To the military agencies——conducting physical search and rescue operations.

b. To the FAA:

(1) Providing emergency service to aircraft in distress.

(2) Assuring that SAR procedures will be initiated if an aircraft becomes overdue or unreported. This is accomplished through the ATC system for IFR aircraft and the flight plan and flight-following system for VFR aircraft.

(3) Attempting to locate overdue or unreported aircraft by INREQ and ALNOT communications search.

(4) Making all possible facilities available for use of the searching agencies.

Department of Transportation Publication # 7110.9D, § 909 n.1 (Jan. 1, 1975).

The FAA is also required to alert the appropriate rescue coordination center in the event of an emergency and supply the center with all available information concerning the aircraft.[9] Thus FAA regulations

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9. The En Route Air Traffic Control Manual states in pertinent part:

When an aircraft is considered to be overdue or in emergency status, alert the RCC and forward the following information, as available:

a. Facility and person calling.

b. Flight Plan including color of aircraft if known.

c. Time of last transmission received, by whom, and frequency used.

d. Last position report and how determined.

e. Action taken by reporting facility and proposed action.

f. Number of persons on board.

g. Fuel status.

h. Facility working aircraft and frequency.

i. Last known position, estimated present position, and maximum range of flight of the aircraft, based on remaining fuel and airspeed.

j. Position of other aircraft near aircraft's route of flight, when requested.

k. Whether or not an ELT signal has been heard or reported in the vicinity of the last known position.

l. Other pertinent information.

Department of Transportation Publication # 7110.9D, § 934 (Jan. 1, 1975).

place a duty upon air controllers to exercise reasonable care in supplying rescue coordination centers with complete and timely information concerning aircraft that are overdue or in distress. A review of the record demonstrates that the FAA did exercise reasonable care in notifying the proper authorities of Swoboda's difficulties.

[5,6] The trial court found that the FAA failed "to transmit the correct location information [of Swoboda's plane] to the Search and Rescue Coordinator ...". To the extent that the information was inaccurate, the inaccuracies did not result from a lack of due care on the part of the FAA. Anchorage Center received the incorrect position report from one of the companion planes and simply relayed it to

the rescue cordination center.[10] A duty to supply complete information does not require the FAA to warrant the accuracy of the data. Only if the inaccuracy resulted from a failure to exercise reasonable care may the FAA be found negligent for transmitting incorrect data to the rescue coordination center. However, even assuming that the FAA negligently supplied incorrect location coordinates for the plane, the negligence did not proximately cause Swoboda's death. Despite

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10. The military aircraft reported the coordinates of Swoboda's strongest ELT signal to one of the companion planes. The companion plane relayed the information received from the military aircraft to FAA authorities at Anchorage Center. However, instead of informing Anchorage Center that the coordinates represented the location of Swoboda's ELT signal, the companion plane mistakenly stated that the coordinates represented the approximate position of Swoboda's plane. According to testimony in the record, Anchorage Center later replayed all of the information in its possession to the Search and Rescue Coordinator, including the incorrect coordinates of Swoboda's last known position that were received from the companion plane.

the incorrect coordinates, the Navy P-3 aircraft actually searched the area where Swoboda's life raft was later found. In fact, had the search occurred at the correct coordinates, the Navy P-3 aircraft would have been dispatched to an area over seven-hundred miles south of the location of the life raft.

Similarly, the FAA's failure to promptly notify the Search and Rescue Coordinator of the missing plane by issuing a DETRESFA or "distress" bulletin as soon as Swoboda's plane was overdue at Adak does not constitute negligence. An hour before the estimated arrival time of Swoboda's plane, Anchorage Center received assurances from one of the companion planes that Swoboda was "ok". When he failed to arrive at Adak, Anchorage Center still had no concrete indication that Swoboda was in distress; in fact, Anchorage Center

was informed by one of the companion planes that Swoboda had probably gone on to the alternate destination, Cold Bay. Thus the FAA had no evidence that Swoboda was in distress and had reason to believe that his failure to land at Adak occurred because he flew to the alternate destination. FAA officials were not, therefore, negligent for failing to issue the distress bulletin as soon as Swoboda's plane was overdue at Adak.

Although a more timely search in the proper area would probably have increased the likelihood of a successful rescue, the delay in the search cannot be attributed to any negligence on the part of the employees of the government. Based upon the information in its possession, particularly repeated assurances from the companion planes that Swoboda was not in distress, the actions by the government's

employees can only be viewed as reasonable.

REVERSED.

THOMAS A. CLARK, Circuit Judge, dissenting:

The majority reverses the district court judge on three separate findings of government negligence. This court holds that the district judge, after listening to all the testimony and reviewing all the evidence, was clearly erroneous not once but three times. To reverse a trial court on a finding, the appellate court must be "left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Company, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). This is a close case which is all the more reason that this court should not substitute its judgment for that of the district court

judge. Because I do not find that the district court was clearly erroneous in the three findings of fact, I would affirm and thus I must dissent.

I.

The government, in the form of the FAA, was negligent, first, in failing to notify the Search and Rescue Coordinator when a report was received that Swoboda was transmitting an ELT signal. This conduct was in clear violation of FAA rules.[1] Substantial evidence in the record supports the trial judge's determination that this conduct was a proximate cause of Swoboda's death. The requirement that the Search and Rescue Coordinator be notified when an ELT is received is clearly aimed at preventing exactly the kind of tragedy that occurred here. Negligence per se

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1. See notes 5 and 6 of the majority's opinion.

was established.[2]

The majority's reliance on the excuse doctrine is misplaced. As this court has previously indicated, the doctrine is an extremely narrow one.

> Violation of a safety statute may be excused under certain circumstances. Thus where non-compliance was due to an emergency situation, or where compliance would be more dangerous than non-compliance, strict compliance has been excused. See Chase v. Tingdale Bros., 1914, 127 Minn. 401, 149 N.W. 654 (child dashes into the street); Cameron v. Stewart, 1957, 153 Me. 47, 134 A.2d 474

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2. The majority sets forth the elements of negligence per se. Although it specifically does not find such negligence in this case, the majority would, I believe, be required on the evidence before us to affirm the district judge's finding of negligence per se.

> (walking on the wrong side of the street where sidewalk is defective). There has been no showing of any justification for failure to comply with the statute here. Indeed, the only explanation for the breach was the belief by the Captain that the linethrowing appliance was illegal, a completely mistaken belief.

Reyes v. Vantage Steamship Co., 558 F.2d 238, 243 (5th Cir. 1977), modified, 609 F.2d 140 (1980). The majority uses this doctrine as a jumping off point into an inquiry as to the reasonableness of the government's action: its negligence. In short, the court disagrees with the district court's finding that the government unreasonably relied on Swoboda's companions. Although the facts support the trial judge's result, the majority substitutes its concept of reasonableness for

the trial court's. The imaginative use of the "excuse" doctrine does not convert the majority's substitution of judgment on factual findings into a correction of an inaccurate application of law by the court below.

II.

The second act of negligence by the government occurred when its agents incorrectly interpreted incoming information as a position report on the doomed flight. Because of this misclassification, an Alert was cancelled and precious hours were lost. The majority concludes that since Swoboda's life raft was later discovered near the point given in the position report, the information was correct and thus there was no negligence. The majority misinterprets the issue. Due to Swoboda's companions' mistake, the searchers initially scrutinized the

wrong area although in hindsight it was the area in which Swoboda's raft was found. However, the harm-causing negligent conduct was the government's cancellation of the uncertainty phase based on a reported ELT, not a mistake with respect to Swoboda's location. Such a report is generally a basis for emergency action,[3] but through a series of incredible assumptions and misunderstandings this ELT transmission was classified as a position report and caused the cancellation of an uncertainty phase.

At 0052 GMT, an "uncertainty" phase was initiated by Anchorage. One of Swoboda's companions soon after reported: "We have just been talking to a MAC aircraft who has been hearing what we believe to be Swoboda's ELT. He turns it on every 15 minutes for a few seconds as his way of

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3. See notes 5 and 6 of the majority's opinion.

telling us he is OK. From talking to the MAC flight we estimate Swoboda to be approximately 49N 171W at 0040 and from that point he should pick up the beacon and navigate to Adak."[4]

The transmission relating this report demonstrates how it was misunderstood:

HNL: Yeah this is message from November six eight six eight reference three six seven four golf

D12: Go ahead

HNL: Okay he advises ah that ah MAC aircraft apparently must have heard

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4. The exact test of the message is:

WE HV JUST BEEN TALKING TO A MAC ACFT WHO HAS BEEN HEARING WHAT WE BLV TO BE 74G ELT. HE TURNS IT ON EVERY 15 MINS FOR A FEW SECONDS AS HIS WAY OF TELLING US HE OK. FROM TALKING TO THE MACH ACFT WE EST 3674G TO BE APPROX 49N 171W AT 0040 AND FROM THAT PX HE SHUD PICK UP THE BEACON AND NAV NML TO ADAK.

HNL R

368 WILL CALL AGN IN 45 MINS

Record at 538.

him talking to ah three seven six four golf and say the MAC aircraft advises that ah every fifteen minutes for a few seconds he was transmitting on ELT I don't know what he meant by that

D12: Okay I know what it is

0059:40 HNL: Well the MAC aircraft advises basing on where he talked to him ah short while he was position forty nine north one seventy one west at zero zero four zero and ah basing from that position on he should be able to pick up beacon with ah (unintelligible) to Adak

D12: Yeah he should

HNL: (unintelligible)

D12: Okay thank you very much

The Anchorage air controllers thereafter believed that a position report had been made by Swoboda:

When I came on duty, N3674G was overdue at the 40N position and had been put in an Incerfa phase. Some time later, Honolulu Center called with a position report on N3674G. They advised position as 49N171W at time 0040 GMT and advised that it had been received by a MAC aircraft who reported that he received it on an emergency locator transmitter. After receiving no position report after 49N171W the aircraft was again placed in Incerfa and Alerfa phases.

Narrative Statement of Carlton L. Schroeder, ATCS, Anchorage ARTC. Record at 575.

On assuming Floor Supervisor duties, I was briefed by the Supervisor I was relieving that the aircraft had radio problems. I checked with the sector to determine what steps were being taken to obtain a progress

report on the aircraft. I was informed that another aircraft heard N3674G transmitting, but was unable to copy his position. When no further reports had been received one hour after N3674G was last heard, I initiated an Incerfa. This Incerfa was later cancelled when we obtained a report from a military aircraft that he had heard N3674G transmitting on his emergency locator transmitter and gave a position without an estimate. When a progress report had not been received an hour later I reissued an Incerfa. When N3674G did not show up at the Centers estimate at Adak and no further communications were received from N3674G I issued an Alerfa. I then informed the Assistant Chief on duty of the Alerfa and was relieved by him.

Narrative Statement of Willard G. Baker, SATCS, Anchorage ARTC Center. Record at 570. In short, then the Alert phase was cancelled based on nothing more than a report by a MAC flight that it had heard an ELT. Normally, such a report would provide an appropriate basis for emergency action. An order issued by the Federal Aviation Administration states in pertinent part:

> a. When an ELT signal is received or reported, it shall be assumed that an emergency exists. FAA facilities shall immediately notify the appropriate rescue coordination center in accordance with procedures currently prescribed ...

Order No. 6050.29 of the Department of Transportation, Federal Aviation Administration (Nov. 19, 1973). Swoboda's

companions assumed that the signal was from Swoboda, assumed that it meant he was OK, and assumed that he was heading in the right direction and would therefore pick up the direction beacon shortly. The government got this information, accepted all assumptions involved, and added the misinformation that Swoboda himself had been heard from. It was hardly reasonable to rely on the string of assumptions that Swoboda's companions had made in face of regulations dictating

action.[5]

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5. The Coast Guard recognized in its investigation that it was the erroneous interpretation of the information from the MAC flight as a position report which caused the problem.

> In the interim Honolulu ARTCC passed N3674G to Anchorage ARTCC after receiving the missing aircraft's 222036Z (1036W) position report which indicated that the aircraft had entered the Anchorage ARTCC area. Anchorage ARTCC was never able to establish direct communications with N3674G, and relied instead on information furnished by N6868 and N7695C which indicated that the missing 74G was still airborne and not in trouble. At 230055Z (1455W) MAC 50237 relayed "flight operations normal" reports to Anchorage Center (ARTCC) for N7695C and N6868 and reported receiving ELT signals at regular intervals from 74G in the vicinity of 49N, 171W indicating that the missing aircraft was not in trouble. This report was misinterpreted by Anchorage Center as meaning that 74G was reporting his position as 49N, 171W when the MAC aircraft was actually reporting the position at which it had received the strongest signal. Anchorage Center had previously issued an "Uncertainty" (INCERFA) at 230052Z (1452W) which was subsequently cancelled after receiving and misinterpreting the MAC report. The uncertainty was reissued at 230137Z (1537W). An "Alert" (ALERFA) was issued at 230300Z (1700W) and a "Distress" (DETRESFA) finally declared at 230450Z (1850W).

Record at 623 (emphasis supplied).

Even under the majority's view that

Even under the majority's view that the FAA does not warrant the accuracy of the information it passes on, the government added error to information received and accepted a strained logic which concluded a pilot was safe based on the receipt of his emergency signal. This conduct is without question negligent.[6]

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6. FAA regulations require that an emergency be assumed whenever there is any doubt. The Enroute Air Traffic Control Manual, No. 7110.-9D, § 907 provides in part:

> When you believe an emergency exists or is imminent, select and pursue a course of action which appears to be most appropriate under the circumstances and which most nearly conforms to the instructions in this manual. If you are in doubt that a given situation constitutes a potential emergency, handle it as though it were an emergency.
>
> 907. Note.——Because of the infinite variety of possible situations, specific procedures cannot always be prescribed for every situation which might be considered an emergency. As a rule of thumb, an emergency includes any situation which places an aircraft in danger; i. e., uncertainty, alert, being lost, or in distress.

The National Search and Rescue Manual, § 741, provides in part:

> The uncertainty phase is assigned anytime doubt exists as to the safety of a craft or person because of knowlege of possible difficulties or because of lack of information concerning progress or position. The key word is doubt.

III.

The final act of negligence on the part of the FAA occurred when no distress bulletin was issued when Swoboda's plane became overdue. The majority does not think this is negligence, because Swboda's companions thought he had probably gone on to an alternate destination. Swoboda like all airmen had been assured by the FAA that if overdue, rescue would be initiated:

> (5) Remember that if you fail to report within one-half hour after your ETA, a search will be started to locate you.

Airman's Information Manual 1-83, 1-84. This is pure substitution of judgment not an application of the clearly erroneous test. Even so, I would certainly agree with the trial judge that this conduct was negligent. The facts which the FAA had before it were: (1) a pilot was

overdue, (2) the pilot personally made only one position report, ninety minutes into the flight, (3) the pilot had reported loss of one communication system and his failure to report likely indicated the loss of another, (4) the loss of some communications raised a specter of the loss of electric power entirely (without power Swoboda would have been robbed of the use of any navigational aids), and (5) although Swoboda had answered communications by using his ELT——one beep for yes, two for no——no such response had been heard for hours. The only thing heard from Swoboda had been a dramatic new pattern of transmission on his ELT for a few seconds every 15 minutes. In my opinion with these facts before it, it was not clearly erroneous for the trial court to find the govenment negligent.

I dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 79-3665

ANNE W. SWOBODA, individually,
and as the Personal Representative of the Estate of
GERARD S. SWOBODA, deceased,

Plaintiff-Appellee-
Cross Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant-
Cross Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion November 23, 5 Cir., 1981, __F.2__).

Before FRANK M. JOHNSON, JR., HENDERSON,
and THOMAS A. CLARK, Circuit Judges.

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452 - October 14, 1980) FF(A&B)-1

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing en banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a

majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

U.S. COURT OF APPEALS
RECEIVED

ATLANTA, GA.

DISTRICT COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
JAN 25 1982
NORMAN E. ZOLLER
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT B

No. 79-3665

ANNE W. SWOBODA, individually,
and as the Personal Representative
of the Estate of GERARD S. SWOBODA,
Deceased,

Plaintiff-Appellee-
Cross Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant-
Cross Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion November 23, 5 Cir., 1981, __F.2d__).

Before FRANK M. JOHNSON, JR. HENDERSON,
and THOMAS A. CLARK, Circuit Judges.

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452-October 14, 1980).

PER CURIAM:

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/Frank M. Johnson, Jr.
United States Circuit Judge

CORRECTED
COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAR 25 1982
NORMAN E. ZOLLER
CLERK

927. OVERDUE AIRCRAFT

Consider an aircraft to be overdue when neither communication nor radar contact can be established with it and 30 minutes have passed since its ETA over a specified or compulsory report point or at clearance limit in your area.

948. EMERGENCY LOCATOR TRANSMITTER (ELT) SIGNALS

When an ELT signal is heard or reported:

a. Notify the Rescue Coordination Center (RCC).

b. Request DF Net attempt to obtain bearings on signal. Forward bearings or fixes obtained plus any other pertinent information to the RCC....

f. Notify the RCC, CCC and deactivate DF net if signal source is located/and or terminated.

1852. EMERGENCY LOCATOR TRANSMITTER (ELT) SIGNALS

When an ELT signal is heard or reported:

a. Notify the ARTCC who will coordinate with the Rescue Coordination Center (RCC).

b. Attempt to obtain a bearing on the signal.

c. Solicit the assistance of other aircraft known to be operating in the signal area.

d. Forward bearings and any other pertinent information to the ARTCC....

g. Notify the ARTCC if signal source is located and/or terminated.

App.67

ORDER

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

6050.29

11/19/73

SUBJ: EMERGENCY LOCATOR TRANSMISSIONS

1. PURPOSE. This order establishes procedures to follow upon receipt of emergency signals of the type associated with Emergency Locator Transmitters (ELT's) on 121.5/243.0 MHz. . . .

3. ACTION.

a. When an ELT signal is received or reported, it shall be assumed that an emergency exists. FAA facilities shall immediately notify the appropriate rescue coordination center in accordance wiqh procedures currently prescribed in applicable directives, e.g., FAA Handbooks 7110.8, 7110.9, 7110.10 and 7210.3. . . .

AIRMAN'S INFORMATION MANUAL 1-83

SEARCH AND RESCUE

1. GENERAL

a. Search and Rescue is a life-saving service provided through the combined efforts of the FAA, Air Force, Coast Guard, State Aeronautic Commissions or other similar state agencies who are assisted by other organizations such as the Civil Air Patrol, Sheriffs Air Patrol, State Police, etc. It provides search, survival aid, and rescue of personnel of missing or crashed aircraft.

b. Prior to departure on every flight, local or otherwise, someone at the departure point should be advised of your destination and the route of flight if other than direct. Search efforts are often wasted and rescue is often delayed because of pilots who thoughtlessly take off without telling anyone where they are going.

c. All you need to remember to obtain this valuable protection is:

(1) File a Flight Plan with an FAA Flight Service Station in person or by telephone or radio.

(2) Close your flight plan with the appropriate authority immediately upon landing.

(3) If you land at a location other than the intended destination, report the landing to the nearest FAA Flight Service Station.

(4) If you land en route and are delayed more than 30 min. (15 min. for jets), report this information to the nearest FSS.

(5) Remember that if you fail to report within one-half hour after your ETA, a search will be started to locate you....

e. To assist survival and rescue in the event of a crash landing the following

advice is given:...

(4) The rapidity of rescue on land or water will depend on how accurately your position may be determined. If flight plan has been followed and your position is on course, rescue will be expedited.

f. Search and Rescue facilities include:

(1) Rescue Coordination Centers;

(2) Search and Rescue aircraft;

(3) Rescue vessels;

(4) Pararescue and ground rescue teams;

(5) Emergency radio fixing.

2. CLOSE YOUR FLIGHT PLAN

The control tower does not automatically close VFR flight plans since many of the landing aircraft are not operating on flight plans. It remains the responsibility of a pilot to close his own flight plan. This will prevent a needless search.

AIRMAN'S INFORMATION MANUAL 1-84

3. NATIONAL SEARCH AND RESCUE PLAN

Under the National Search and Rescue Plan, the U.S. Coast Guard is responsible for coordination of search and rescue for the Maritime Region, and the U.S. Air Force is responsible for coordination of search and rescue for the Inland Region. In order to carry out this responsibility the Air Force and the Coast Guard have established Rescue Coordination Centers to direct search and rescue activities within their regions. This service is available to all persons and property in distress, both civilian and military. Normally, for aircraft accidents, information will be passed to the Rescue Coordination Centers through the appropriate Air Route Traffic Control Center or Flight Service Station.

1800. EMERGENCY DETERMINATIONS

When you believe an emergency exists or is imminent, select and pursue a course of action which appears to be most appropriate under the circumstances and which most nearly conforms to the instructions in this manual. If you are in doubt that a given situation constitutes a potential emergency, handle it as though it were an emergency. (N)

1800. Note.——Because of the infinite variety of possible situations, specific procedures cannot always be prescribed for every situation which might be considered an emergency. As a rule of thumb, an emergency includes any situation which places an aircraft in danger; i.e., uncertainty, alert, being lost, or in distress.

1840. EMERGENCY SITUATIONS

Consider that an aircraft emergency exists and inform the ARTCC and DF Net Control, if not the same, when: (N)

a. An emergency is declared by either:

(1) The pilot.

(2) Facility personnel.

(3) Officials responsible for the operation of the aircraft.

b. Reports indicate it has made a forced landing, is about to do so, or its operating efficiency is so impaired that a forced landing will be necessary.

c. Reports indicate the crew has abandoned the aircraft or is about to do so....

f. The need for ground rescue appears likely.

h. An Emergency Locator Transmitter (ELT) signal is heard or reported. (R)

1841. INFORMATION TO BE FORWARDED TO ARTCC

When an aircraft is considered to be overdue or in emergency status, alert the ARTCC and forward the following information, as available:

a. Flight plan including color of aircraft if known.

b. Time of last transmission received, by whom, and frequency used.

c. Last position report and how determined.

d. Action taken by reporting facility and proposed action.

e. Number of persons on board.

f. Fuel status.

g. Facility working aircraft and frequency.

h. Last known position, estimated present position, and maximum range of flight of the aircraft based on reminaing fuel and airspeed.

907. EMERGENCY DETERMINATIONS

. . . When you believe an emergency exists or is imminent, select and pursue a course of action which appears to be most appropriate under the circumstances and which most nearly conforms to the instructions in this manual. If you are in doubt that a given situation constitutes a potential emergency, handle it as though it were an emergency.

907. Note. — Because of the infinite variety of possible situations, specific procedures cannot always be prescribed for every situation which might be considered an emergency. As a rule of thumb, an emergency includes any situation which places an aircraft in danger, i. e., uncertainty, alert, being lost, or in distress. . . .

928. EMERGENCY SITUATIONS

Consider that an aircraft emergency exists and inform the RCC and alert the DF Net when: (N)

a. An emergency is declared by either;

(1) The pilot.

(2) Facility personnel.

(3) Officals responsible for the operation of the aircraft.

b. Reports indicate it has made a forced landing, is about to do so, or its operating efficiency is so impaired that a forced landing will be necessary.

c. Reports indicate the crew has abandoned the aircraft or is about to do so....

f. The need for ground rescue appears likely....

h. An Emergency Locator Transmitter (ELT) signal is heard or reported. (R)

i. Position of other aircraft near aircraft's route of flight when requested.

j. Whether or not an ELT signal has been heard or reported in the vicinity of the last known position.

k. Other pertinent information.

948. EMERGENCY LOCATOR TRANSMITTER (ELT) SIGNALS

When an ELT signal is heard or reported:

a. Notify the Rescue Coordination Center (RCC).

b. Request DF Net attempt to obtain bearings on signal. Forward bearings or fixes obtained plus any other pertinent information to the RCC.

c. Solicit the assistance of other aircraft known to be operating in the signal area....

f. Notify the RCC, CCC and deactivate DF net if signal source is located/and or terminated.

934. INFORMATION TO BE FORWARDED TO RCC

When an aircraft is considered to be overdue or in emergency status, alert the RCC and forward the following information, as available:

a. Facility and person calling.

b. Flight plan including color of aircraft if known.

c. Time of last transmission received, by whom, and frequency used.

d. Last position report and how determined.

e. Action taken by reporting facility and proposed action.

f. Number of persons on board.

g. Fuel status.

h. Facility working aircraft and frequency.

i. Last known position, estimated present position, and maximum range of flight of the aircraft, based on remaining fuel and airspeed.

j. Position of other aircraft near aircraft's route of flight, when requested.

k. Whether or not an ELT signal has been heard or reported in the vicinity of the last known position.

l. Other pertinent information.

1802. PROVIDING ASSISTANCE

1802. Note 1. — The National SAR Plan assigns search and rescue responsibilities as follows:

a. To the military agencies conducting physical search and rescue operations.

b. To the FAA —

(1) Providing emergency service to aircraft in distress.

(2) Assuring that SAR procedures will be initiated if an aircraft becomes overdue or unreported. This is accomplished through the ATC system for IFR aircraft

. . . .

(3) Attempting to locate overdue or unreported aircraft by INREQ and ALNOT communications search.

(4) Cooperating in the physical search by making all possible facilities available for use of the searching agencies.

1803. RESPONSIBILITY

a. If you are in communication with an aircraft in distress, handle the emergency and coordinate and direct, the activities of assisting facilities. Transfer this responsibility to another facility only when you feel better handling of the emergency will result.

b. When you receive information about an aircraft in distress, forward detailed data to the Center in whose area the emergency exists. (N)

c. The ARTCC is responsible for consolidation of all pertinent ELT signal information. Forward all heard or reported ELT signals to the Center.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1982

In the Supreme Court of the United States

OCTOBER TERM, 1981

ANNE W. SWOBODA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GERARD S. SWOBODA, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1982

ANNE W. SWOBODA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GERARD S. SWOBODA, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks damages under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, for the death of her husband, a commercial pilot who was lost while on a trans-Pacific flight from Midway Island to Alaska. Petitioner asserts that the government, through the Federal Aviation Administration (FAA) and the Coast Guard, was negligent in the initiation and conduct of the search and rescue operation that, despite 12 days of effort, did not locate the missing plane or pilot. The district court held that the pilot and the government were equally at fault and awarded petitioner damages for half of her alleged loss (Pet. App. 1-15). On cross appeals, each party asserted that the other's negligence was the sole proximate cause of the death. The court of appeals, applying settled search and rescue law and the

"clearly erroneous" standard of review, reversed the district court's findings of negligence on the part of the FAA and Coast Guard (Pet. App. 16-58).

1. The undisputed facts of this case are summarized in the opinion of the court of appeals (Pet. App. 21-29). On September 22, 1975, at 17:26 Greenwich Mean Time (GMT), Gerard Swoboda, an experienced pilot, departed Midway Island for Adak, Alaska, in the company of two other planes. His flight plan indicated that the trip would take eight hours and that his plane contained enough fuel for 11 hours. His alternate destination in the event Adak could not be reached was Cold Bay, Alaska. Soon after takeoff, he experienced radio transmission difficulties and began communicating with his companion planes by means of intermittent pulses over his Emergency Locator Transmitter (ELT). Swoboda made a required position report to Honolulu Aeronautical Radio at 20:36 GMT, and estimated that he would arrive at the next compulsory reporting station in an hour. Swoboda did not make that required report, apparently because of worsening transmission difficulties. One of Swoboda's companion aircraft, however, notified Honolulu that it was in contact with Swoboda by means of his ELT transmissions and that operations for the three planes were normal.

Five hours outside of Midway, one of the companion planes notified Honolulu that Swoboda no longer had transmission capabilities, but that he was communicating with the companion planes by turning his ELT on and off. At 00:40 GMT, a military aircraft heard an intermittent ELT signal and contacted Swoboda's companion planes, giving them the coordinates for the signal. At 00:52 GMT, officials at the Anchorage Air Route Traffic Control Center issued an "uncertainty" bulletin (INCERFA) because of Swoboda's failure to make a position report. Three minutes

later, one of Swoboda's companion planes notified Anchorage that the military aircraft had heard the intermittent ELT signal and that the signal was Swoboda's "way of telling us he [is] ok" (Pet. App. 26). Concluding that Swoboda was not in distress, Anchorage cancelled the uncertainty bulletin. The uncertainty bulletin was reinstated 45 minutes later after Swoboda was again overdue for a position report. The companion planes landed at Adak soon thereafter and informed officials at Anchorage that Swoboda had probably flown to his alternate Cold Bay destination. Shortly after Swoboda's estimated arrival time at Cold Bay, an "alert" bulletin (ALERFA) was issued, and at 04:50 GMT, 30 minutes after the estimated exhaustion of Swoboda's fuel, a "distress" bulletin (DETRESFA) was issued.

A sophisticated Navy aircraft equipped with electronic and night search equipment was immediately dispatched to search for Swoboda. However, because Swoboda's companion aircraft erroneously reported the coordinates for his last known ELT transmission, the plane began searching 700 miles north of Swoboda's last reported position. On September 27, 1975, after five days of search and rescue operations, a Coast Guard aircraft sighted a yellow life raft belonging to the downed pilot 18 miles south of Adak, in the general vicinity of the original search. Rescue operations were finally discontinued after a 12-day search that covered an area of over 300,000 miles.

2. After a bench trial, the United States District Court for the Southern District of Florida held that the government was negligent in three respects: failing promptly to initiate rescue operations after learning of Swoboda's intermittent ELT signal (Pet. App. 9-10), failing to issue a distress bulletin when Swoboda was overdue at Adak (*id.* at 10), and failing to provide rescue workers the correct coordinates for Swoboda's last known position (*ibid.*). The court also found that Swoboda was negligent in using his

ELT for nonemergency transmissions (*id.* at 10-11). The court therefore concluded that the government's negligence was "a 50% proximate contributing cause" of death and awarded $225,000 in damages to petitioner (*id.* at 15).

On appeal, a divided panel of the court of appeals reversed (Pet. App. 16-58). The court concluded that, even assuming that the FAA's failure to respond to Swoboda's ELT signals violated agency regulations, "[t]he facts surrounding Swoboda's ELT transmission demonstrate that Anchorage Center reasonably believed that the signal was not intended to indicate distress" (*id.* at 33). FAA officials knew that Swoboda's radio was not functioning and that he had been using his ELT to communicate with his companion planes. "Thus, it was reasonable for FAA officials to rely upon the companion plane's message that Swoboda's ELT transmission did not signify distress but was instead a means of communicating" (*id.* at 34). The court likewise concluded that the FAA's failure to provide the correct coordinates for Swoboda's last known position did not constitute negligence. "Anchorage Center received the incorrect position report from one of the companion planes and simply relayed it to the rescue coordination center. A duty to supply complete information does not require the FAA to warrant the accuracy of the data" (*id.* at 39-40; footnote omitted).[1]

As for the FAA's failure to issue a distress bulletin immediately upon Swoboda's becoming overdue at Adak, the court of appeals noted that one hour before Swoboda's estimated arrival time at Adak, the companion planes had assured Anchorage that Swoboda was "ok" (Pet. App. 41) and upon their arrival at Adak had informed officials that

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[1]The court also noted that the incorrect coordinates resulted in a search of the area where Swoboda's life raft was subsequently found (Pet. App. 40-41).

Swoboda had probably gone on to his alternate destination (*id.* at 42). Because "the FAA had no evidence that Swoboda was in distress and had reason to believe that his failure to land at Adak occurred because he flew to the alternate destination," the agency was not "negligent for failing to issue the distress bulletin as soon as Swoboda's plane was overdue at Adak" (*ibid.*).

3. Certiorari is clearly not warranted on the facts of this case. Despite petitioner's efforts to characterize the court of appeals' decision as a misapplication of the Good Samaritan doctrine[2] or the "excuse" doctrine permitting deviation from FAA regulations,[3] it is apparent from the lower courts' decisions and from the petition itself that this matter is, at bottom, merely a factual dispute that does not merit further judicial attention.[4] This Court does not '[g]rant[] * * * the writ [of certiorari] * * * merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178

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[2] *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955).

[3] *Reyes* v. *Vantage Steamship Co.*, 558 F. 2d 238 (5th Cir. 1977), modified, 609 F. 2d 140 (1980); *Delta Air Lines, Inc.* v. *United States*, 561 F. 2d 381 (1st Cir. 1977).

[4] Contrary to petitioner's assertions (Pet. 13-33), the court of appeals' decision does not radically restructure the Good Samaritan doctrine or conflict with the decisions of other federal courts that apply the doctrine. Rather, the court below merely concluded that even if the Good Samaritan doctrine were applied to this case, "the government would not be liable since the [petitioner] has failed to prove any negligence on the part of the FAA" (Pet. App. 36 n.7). The court's application of the "excuse" doctrine likewise does not conflict with any precedent from this or any other federal court, but instead rests upon the court of appeals' careful factual analysis of the circumstances of this case. The court concluded that the failure of FAA employees to respond to the decedent's ELT signal was excusable in the context of this case. "Based upon the information in its possession, particularly repeated assurances from the companion planes that Swoboda was not in distress, the actions by the government's employees can only be viewed as reasonable" (*id.* at 42-43).

(1938), citing *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924); *United States* v. *Johnston*, 268 U.S. 220 (1925). The decision of the court of appeals is based on a careful factual analysis and sound legal reasoning and is not appropriate for further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982

DOJ-1982-05